Supreme Court, U.S.
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No. 01-___

In The

Supreme Court of the United States

ROBERT HAWKINS, individually, as Superintendent of the Colorado Mental Health Institute at Pueblo; GARRY TOERBER, individually, as Associate Manager for the Office of Direct Services of the Department of Human Services,

Petitioners,

v.

JAMES NEIBERGER, DANFORD ELDRIDGE, PAUL GARDNER and TERENCE JACOBS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Petitioners are Robert Hawkins, Superintendent of the Colorado Mental Health Institute at Pueblo, Colorado ("CMHI-P"), and Garry Toerber, Associate Manager for the Office of Direct Services of the Colorado Department of Human Services, and Director of CMHI-P. Hawkins and Toerber were sued in the district court in their individual and official capacities. Respondents are four current patients of the Forensic Institute at CMHI-P, committed pursuant to adjudications of not guilty by reason of insanity. In their Complaint, Respondents challenged their conditions of confinement at CMHI-P. Petitioners as individuals raised their qualified immunity from suit in a motion to dismiss. The courts below denied qualified immunity. The questions presented are:

1. Whether Petitioners should be afforded qualified immunity from suit as individuals because of the inchoate state of the law of substantive due process, disregarded by the courts below and left open in this Court, and because Respondents' complaint contains no allegations of personal involvement of each individual Petitioner in the alleged substantive due process violations of each individual Respondent.

2. Whether the courts below erred as a matter of law in announcing a new standard of substantive due process law not previously clearly established, and then ruling that individual Petitioners nonetheless were *not* entitled to qualified immunity.

PARTIES TO THE PROCEEDINGS

Petitioners, Defendants below, are Robert Hawkins ("Hawkins"), Superintendent of the Colorado Mental Health Institute at Pueblo, Colorado ("CMHI-P"), and Garry Toerber ("Toerber"), Associate Manager for the Office of Direct Services of the Colorado Department of Human Services ("CDHS"), and Director of CMHI-P. Hawkins and Toerber were sued in the district court in their individual and official capacities. This petition is made by Hawkins and Toerber as individuals.

Respondents, Plaintiffs below, are four current patients of the Forensic Institute at CMHI-P, committed pursuant to adjudications of not guilty by reason of insanity.

All parties are individuals with no parent companies or non-wholly owned subsidiaries to be disclosed pursuant to Rule 29.6.

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PETITION FOR A WRIT OF CERTIORARI

Public officials Defendants Robert Hawkins and Garry Toerber as individuals petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in this case on March 8, 2001.

OPINIONS BELOW

The unreported opinion of the Court of Appeals for the Tenth Circuit is reprinted in the Appendix hereto ("App.") at 1. That opinion affirmed a decision of the District Court for Colorado reported at 70 F.Supp.2d 1177 that is reproduced at App. 13.

JURISDICTION

The Court of Appeals for the Tenth Circuit issued its opinion on March 8, 2001. A timely petition for rehearing was denied on April 27, 2001. App. 53-54. The jurisdiction of the District Court was based upon 28 U.S.C. §§ 1331 and 1343. The jurisdiction of the Court of Appeals was based upon 28 U.S.C. § 1291 and the collateral order doctrine. *Mitchell v. Forsyth*, 472 U.S. 522, 530 (1985). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment to the United States Constitution in Section 1 states in pertinent part that "[n]o State shall make or enforce any law which shall . . . deprive any person of life, liberty or property, without due process of law[.]" U.S.Const. amend. XIV, § 1.

Section 1983, 42 U.S.C., R.S. § 1979, Act Apr. 20, 1871, c. 22, § 1, 17 Stat. 13; amended, Pub.L. 96-170, § 1, Dec. 29, 1979, 93 Stat. 1284; amended Pub.L. 104-317, Title III, § 309(c), Oct. 19, 1996, 110 Stat. 3853, provides in pertinent part that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof, to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress[.]

STATEMENT OF THE CASE

1. Respondents are patients at the Colorado Mental Health Institute at Pueblo ("CMHI-P"), hospitalized there as a result of being adjudicated not guilty by reason of insanity. Respondents sued Petitioners Hawkins and Toerber, the Superintendent of CMHI-P and the Deputy Manager for Direct Services of the Colorado Department of Human Services, respectively, as officials and as individuals. Respondents generally claim that they do not

and have not received constitutionally adequate care and treatment, purportedly in violation of the rule of *Youngberg v. Romeo*, 457 U.S. 307 (1982). App. 2-3.

2. Respondents' complaint alleged that Petitioners as hospital administrators were "personally aware" of Respondents' allegations of substantive due process violations, and possessed personal knowledge of Respondents' allegations of "insufficient care" and "poor treatment." App. 7. Respondents' complaint also alleged that both Petitioners possessed "actual notice" of Respondents' allegations of substantive due process violations based on the content of consultant reports commissioned by CMHI-P. App. 7.

3. Petitioners moved to dismiss under Fed.R.Civ.P. 12(b)(6) based on qualified immunity. App. 13, 38. The district court denied that motion, first on the ground that Respondents had stated sufficient facts of personal participation to overcome Petitioners' entitlement to qualified immunity, and then on the ground that substantive due process law was clearly established under *Youngberg v. Romeo*, 457 U.S. 307 (1982). App. 41. Petitioners appealed pursuant to *Behrens v. Pelletier*, 516 U.S. 299 (1996). The court of appeals affirmed the district court upon essentially the same reasoning as the trial court employed. App. 6, 9.

REASONS FOR GRANTING THE WRIT

A. THE COURTS BELOW RESOLVED QUALIFIED IMMUNITY AGAINST PETITIONERS ON A QUESTION OF SUBSTANTIVE DUE PROCESS LAW LEFT OPEN BY THIS COURT AND NOT RESOLVED BY THE CIRCUIT COURTS.

This Court in *Youngberg v. Romeo* determined that substantive due process would be violated if the involuntarily committed were not provided appropriate care and treatment, balanced against institutional prerogatives and necessities. *Youngberg*, 457 U.S. at 321-22, 324-25. The question of the exact scope, nature and elements of this substantive due process right was left open in *Youngberg*. *See, e.g., Savidge v. Fincannon*, 836 F.2d 898, 907-08 (5th Cir. 1988) (relying generally upon *Youngberg v. Romeo* to overcome entitlement to qualified immunity, while noting that the Court in *Youngberg* left open the question of what specific acts might constitute a deprivation of substantive due process for the involuntarily institutionalized).

The *Youngberg* Court did not hold, or even discuss, imposing liability on administrators based on their knowledge of consultant reports and general criticisms of treatment and conditions. The Tenth Circuit has not so held, and no other circuit level court has so held. Nevertheless, after denying qualified immunity to Petitioners, the courts below relied solely upon *Youngberg v. Romeo* to hold in essence that the principles of substantive due process law were so clearly established at the time of the acts alleged in Respondents' complaint that any administrator in the position of either Petitioner would know that

Respondents' substantive due process rights were violated when either Petitioner possessed knowledge of consultant reports commissioned by CMHI-P or general allegations of improper care and treatment at CMHI-P. App. 6; App. 9, n. 18. *See Dolihite v. Maughon*, 74 F.3d 1027 (11th Cir. 1996) (the broad legal truism of *Youngberg v. Romeo* is insufficient to overcome individual defendants' entitlement to qualified immunity).

The courts below did not even attempt to pose the particularized question whether the law was clearly established in the necessary, particularized sense, or survey the law of substantive due process in any meaningful sense. This evaluation is required by *Wilson v. Layne*, 526 U.S. 603, 614, 615, 616 (1999), and *Anderson v. Creighton*, 483 U.S. 635, 639 (1987). *See, e.g., Crawford-El v. Britton*, 523 U.S. 574, 592 (1998). Petitioners submit that the courts below did not do so because the law of substantive due process is *not* clearly established, and thus Petitioners should have been afforded qualified immunity.

B. THE COURT BELOW ERRED IN RULING THAT RESPONDENTS' ALLEGATIONS OF PERSONAL PARTICIPATION AS SET OUT IN THEIR COMPLAINT WERE SUFFICIENT TO OVERCOME INDIVIDUAL DEFENDANTS' QUALIFIED IMMUNITY FROM SUIT AT THE MOTION TO DISMISS STAGE.

Notwithstanding *Leatherman v. Tarrant County Narcotics Intelligence & Coord. Unit*, 509 U.S. 163, 168 (1993) (notice pleading sufficient to state a claim for a constitutional deprivation against a public entity), this Court has not repudiated the personal participation element necessary to establish causation for claims against individuals. *See Crawford-El v. Britton*, 523 U.S. at 592.

Affirming the district court, the court below in essence ruled that Respondents may state a claim against public officials such as Hawkins and Toerber *as individuals*, that is, seeking monetary damages from each of them personally, including exemplary damages, by stating that those individuals served in supervisory capacities and knew of statements in consultant reports of CMHI-P and general complaints about conditions at CMHI-P. App. 7; App. 9, n. 18. A careful examination of *Youngberg* confirms that mere official presence is insufficient to establish a claim for a substantive due process violation at all, much less a claim against an individual.

The *Youngberg* Court concluded that liability may be assessed against professionals such as Petitioners here for a substantive due process violation respecting care and treatment and conditions of confinement "*only* when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or

standards as to demonstrate *that the person responsible actually did not base the decision on such a judgment.*" *Youngberg*, 427 U.S. at 322-25, 2461-63 (emphasis added); *Jackson by Jackson v. Fort Stanton Hospital & Training School*, 964 F.2d 332, 991-92 (10th Cir. 1976). Although the Respondents generally allege that the Petitioners are responsible for all activities allegedly causing the purported substantive due process violations, they violate the command of *Youngberg* by failing to allege what particular decision was the responsibility of each Respondent. Absent such allegations, causation as to the alleged constitutional violations suffered by each individual Respondent cannot be established.

The court below erred when it did not require more. Where the allegations are based only on Petitioners' positions and a general allegation of knowledge as to criticisms of the care and treatment provided, Petitioners state that not only the rule of *Crawford-El* is violated, but the rule of *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 694-695 (1978) that liability for a constitutional violation cannot be predicated upon *respondeat superior*.

As the *Youngberg* Court stated:

> In determining whether the State has met its obligations in these respects [care and treatment], decisions made by the appropriate professional are entitled to a presumption of correctness. Such a presumption is necessary to enable institutions of this type – often, unfortunately, overcrowded and understaffed – to continue to function. A single professional may have to make decisions with respect to a number of residents with widely varying needs and

> problems in the course of a normal day. The administrators, and particularly professional personnel, should not be required to make each decision in the shadow of an action for damages.

Youngberg, 457 U.S. at 324-25, 2462-63. *See also Jackson by Jackson v. Fort Stanton Hospital & Training School, supra*. *See also Kite v. Kelley*, 546 F.2d 332, 336-37 (10th Cir. 1976), citing *Rizzo v. Goode*, 423 U.S. 362, 371 (1976) (requiring an "affirmative link" between the action of the defendant and the harm alleged).

The court below noted that the facts as pled by Respondents in their complaint present a "close question" whether Respondents met the threshold of *Youngberg* at all. App. 6. The defense of qualified immunity exists to protect individual public officials from the specter of lawsuits based on those officials' actions in their official duties *unless* a plaintiff shows the presence of a constitutional violation by *that* individual. *See Rouse v. Plantier*, 183 F.3d 192, 200 (3rd Cir. 1999) (district courts should address the "specific conduct of each of the individual defendants"). Petitioners submit that if the issue whether Respondents had stated a claim of constitutional proportions at all presented a "close question" to the court below, the law under the allegations presented could not be so clearly established that any individual in the position of each Petitioner here should have known that a constitutional violation allegedly was present. *Anderson v. Creighton*, 483 U.S. at 638, 646; *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

In similar circumstances, circuit courts have acknowledged individual defendants' entitlement to qualified immunity. *See, e.g., Dolihite v. Maughon*, 74 F.3d at 1052-53;

Rodgers v. Horsely, 39 F.3d 308, 311 (1994) (hospital administrators entitled to qualified immunity based on allegations of failure to train and supervise resulting in rape of patient where there were no allegations of notice to the individual defendants of the potential that such an act would or could occur, much less that it could be the result of a failure to train or supervise); *Stubig v. Hammel*, 714 F.2d 292, 310-11 (3rd Cir. 1983) (individual administrators entitled to qualified immunity for plaintiff's allegations of inadequate care and treatment for failure to link individual defendants to deprivations alleged). *And see Currier v. Doran*, 242 F.3d 905, 923-25 (10th Cir. 1999) (properly applying and analyzing actions of each individual in the alleged constitutional violations) (cited by the court below in footnote 10). *Cf. Kyle K. v. Chapman*, 208 F.3d 940, 943, 944 and n.1 (11th Cir. 2000) (individual defendants who personally participated in day-to-day care not entitled to qualified immunity based on allegations of physical abuse of plaintiff by them).

In addition, as this Court noted in *Board of County Commissioners of Bryan County, Okla. v. Brown*, 520 U.S. at 411, in the context of allegations of unconstitutional actions made against a public entity based on the actions of a final policymaker, "a court must carefully test the link between the policymaker's inadequate decision and the particular injury alleged." Petitioners submit that the link should be no less carefully tested where allegations that could result in personal, individual liability are concerned.

As noted herein, the causal link relied upon by the courts below was comprised of the allegation that Petitioners personally were aware of Respondents' allegations of substantive due process violations based upon the contents of consultant documents and general complaints about CMHI-P. App. 7; App. 9, n. 18. Respondents did not allege that: those documents were supplied on a regular and recurring basis, or that if they were, such documents usually were critical; or that if the documents were issued only on one occasion, that they contained specific information as to each individual Respondent; or that the documents described in any manner the particulars as to the daily care and treatment of any individual Respondent, or provided information respecting any individual health care provider to Respondents – factors that could alert Petitioners to allegations of specific substantive due process violations of Respondents existing at the time the reports were made, and as to which Petitioners possessed the power to cure or alleviate.

Similarly to the plaintiff in *Board of County Commissioners of Bryant County v. Brown*, therefore, Respondents' complain that allegations in a consultant's report and an internal review should have alerted Petitioners to the potential that constitutional violations to Respondents were occurring or had occurred, and thus that Petitioners' alleged failure to respond to those allegations was the cause of Respondents' injuries. The court below, however, does not identify allegations in Respondents' complaint which if proved true would indicate that Respondents' own individual injuries, if any, were more likely than not the result of inaction of the Petitioners in the face of the consultant's report and the internal review,

rather than resulting from some other intervening cause, such as Respondents' failure to comply with treatment plans mandated by appropriate medical professionals, staffing levels mandated by budgetary constraints over which Petitioners did not have immediate control, and the like. Petitioners submit that the court below erred in relying upon no more than the allegations that Petitioners Hawkins and Toerber personally were aware of the allegedly unconstitutional conditions suffered by each individual Respondent at the hands of each individual Petitioner based on statements critical of hospital operations, because reliance on a mere allegation of personal knowledge in such circumstances is no stronger than reliance on a mere allegation of malice. *See Crawford-El v. Britton*, 523 U.S. at 589.

C. TO THE EXTENT THAT THE COURTS BELOW ANNOUNCED A NEW RULE OF SUBSTANTIVE DUE PROCESS IN THIS CASE, THOSE COURTS ACTED CONTRARY TO PRECEDENT OF THIS COURT IN APPLYING THAT RULE TO PETITIONERS HERE, DENYING THEM QUALIFIED IMMUNITY.

In *Davis v. Scherer*, 468 U.S. 183 (1984), this Court reversed the denial of qualified immunity to individual defendants based upon announcement of a new rule of procedural due process law, previously unsettled, even among the panels of the court below. *Davis v. Scherer*, 468 U.S. at 190. To the extent that, as explained above, substantive due process precedent is unsettled, and the courts below sought to clarify its application in the circumstances of this case, those courts erred in failing to

grant qualified immunity to Petitioners here under that new rule.

D. THE COURTS BELOW IGNORED IMPORTANT AND DIRECTLY APPLICABLE PRECEDENT OF THIS COURT TO ESTABLISH A NEW SUBSTANTIVE DUE PROCESS VIOLATION ALSO DENYING PETITIONERS' QUALIFIED IMMUNITY WITHOUT ANALYZING APPLICABLE LAW.

In failing to address whether Respondents had stated a claim of constitutional proportions under substantive due process in the first instance, the court below directly violated the rule of *Saucier v. Katz*, 121 S.Ct. 2151 (2001), and *Collins v. City of Harker Heights*, 503 U.S. 115 (1995), as well as other rulings of this Court and of courts of appeal.

Although purporting to do otherwise, the courts below resolved the qualified immunity issue *before* addressing whether the law of substantive due process under the circumstances presented by Respondents' complaint stated any claim for a violation of substantive due process at all. App. 5-10; App. 38-41. In doing so, the courts below violated the rule of both recent and long-standing precedent of this Court, and the courts of appeals that follow such precedent, directing that the first question to be addressed is whether a plaintiff has stated any claim of constitutional proportions. *Saucier v. Katz*, 121 S.Ct. at 2156; *Collins v. City of Harker Heights*, 503 U.S. at 120; *Siegert v. Gilley*, 500 U.S. 226, 232 (1991). *See, e.g., Jean v. Collins*, 221 F.3d 656, 658-59 (4th Cir. 2000); *Crosby v. Paulk*, 187 F.3d 1339, 1345 (11th Cir. 1999); *Mattox v. City of Forrest Park*, 183 F.3d 515, 520 (9th Cir. 1999); *Assaf v. Fields*, 178 F.3d 170, 174 (3rd Cir. 1999). *Cf. Mollica v.*

Voelker, 229 F.3d 366, 371-72 (2nd Cir. 2000) (declining to reach issue of whether constitutional right had been violated in the first instance, although granting qualified immunity based on lack of clearly established law).

The danger of doing so, as this Court points out in *Saucier v. Katz*, is that the procedure used by the courts to address qualified immunity before analyzing the existence of any constitutional violation "skip[s] ahead." *Saucier v. Katz*, 121 U.S. at 2156. In skipping ahead, courts such as the courts below eliminate not only an analysis of the existence of any constitutional violation itself, but also the inquiry essential to a qualified immunity determination, that is, whether the constitutional right at issue was clearly established in the requisite, particularized sense. *Saucier v. Katz*, 121 U.S. at 2157.

This case presents an example of misapplication of the qualified immunity analysis, and an example of failure to recognize and apply directly applicable precedent.

As noted by this Court in *Saucier v. Katz*, and as noted herein, the elaboration of clearly established law proceeds from case to case. *Saucier v. Katz*, 121 S.Ct. at 2156. Eliminating or conflating the steps of the qualified immunity analysis allows courts such as the courts below to misidentify unsettled rules of law as clearly established. Skipping the first two steps thus subjects public officials such as Petitioners as individuals to the specter of liability for damages, notwithstanding that they could not have conformed their behavior to the newly announced constitutional standard, because it was only

just announced in their case. *Davis v. Scherer*, 468 U.S. at 190.

CONCLUSION

For the reasons set out above, the Court should grant certiorari to review the misapplication by the courts below of important principles of constitutional law established by precedent of this Court; to clarify the tension in the circuits regarding substantive due process principles applicable to the involuntarily committed in the circumstances of this case; and to resolve the tension between circuit level opinions whether the allegations of knowledge presented by Respondents here are sufficient to overcome Petitioners' qualified immunity; or to reverse and remand for redetermination apply the appropriate standards.

Respectfully submitted,

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NOTICE: THIS IS AN UNPUBLISHED OPINION.

United States Court of Appeals, Tenth Circuit.

James **NEIBERGER**; Danford Eldridge; Paul Gardner; Terence Jacobs, Plaintiffs-Appellees,

v.

Robert HAWKINS, Superintendent of the Colorado Mental Health Institute at Pueblo; Garry Toerber, Associate Manager for the Office of Direct Services of the Department of Human Services; Robert L. Hawkins, individually; Garry Toerber, individually, Defendants-Appellants.

and

Colorado Department of Human Services; Colorado Mental Health Institute at Pueblo, Defendants.

No. 99-1535.

March 8, 2001.

Before BRISCOE, HOLLOWAY, and POLITZ,** Circuit JJ.

** The Honorable Henry A. Politz, United States Court of Appeals for the Fifth Circuit, sitting by designation.

ORDER AND JUDGMENT*

POLITZ.

Robert Hawkins and Garry Toerber appeal the district court's denial of their motion to dismiss, contending that the court erred in denying them qualified immunity as individuals and in rejecting their contention that plaintiffs failed to comply with the provisions of the Colorado Governmental Immunity Act ("CGIA"). For the reasons assigned we affirm.

BACKGROUND

Plaintiffs are patients committed to the Institute of Forensic Psychiatry at the Colorado Mental Health Institute at Pueblo ("CMHI-P"). All were committed indefinitely after criminal proceedings found them "not guilty by reason of insanity."[1] The Colorado Department of Human Services ("CDHS") controls CMHI-P. Toerber is the Deputy Manager for the Office of Direct Services of CDHS. Hawkins is the Superintendent of CMHI-P.

Plaintiffs' action challenges their ward assignments, treatment options and conditions of confinement. They allege a "continuous pattern of substandard care," focusing on the lack of individualized treatment plans, their inability to participate in treatment, and the threatened

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir.R. 36.3.

[1] See Colo.Rev.Stat. § 16-8-105 (1990).

administration of psychotropic medications. They also complain of undue restraints, inappropriate sanitation, poor medical care and a disregard for personal safety. They invoke Colorado's Care and Treatment of the Mentally Ill Act,[2] 42 U.S.C. § 1983, the Americans with Disabilities Act,[3] and common law negligence rules. They urge these claims in a putative class action with other individuals committed to CMHI-P. The district court dismissed various claims on grounds of sovereign immunity, but declined to dismiss claims against the defendants as individuals, denying appellants' 12(b)(6) motion with respect to qualified immunity under § 1983, and finding that the CGIA did not preclude the common law negligence claim. This interlocutory appeal by Toerber and Hawkins questions the district court's denial of their motion to dismiss based on qualified immunity and the CGIA.

ANALYSIS

A. Qualified Immunity

The rejection of a defendant's qualified-immunity defense, "to the extent that it turns on an issue of law, is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment."[4] Specifically, we have held that "[i]f the defendant argues that she is entitled to qualified immunity under the plaintiff's version of the facts because the

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[2] Colo.Rev.Stat. § 27-10-101 *et. seq.* (1990).

[3] 42 U.S.C. § 12101 *et. seq.* (1995).

[4] *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985).

plaintiff has not demonstrated a violation of clearly established law, this Court may properly exercise jurisdiction over an interlocutory appeal."[5] Appellants herein advance that contention.

To accept a claim of qualified immunity, we first must decide whether the plaintiffs sufficiently alleged that the defendants violated a statutory or constitutional right, and if so, whether that right was clearly established and a reasonable person in the defendants' position would have known that his or her conduct violated that right.[6] We review *de novo* a lower court's denial of qualified immunity because an appeal of such order presents issues of law.[7] In the context of a 12(b)(6) motion to dismiss, our review of the qualified immunity defense is limited to the pleadings.[8] In assessing the pleadings, we construe the allegations in the complaint, and any reasonable inferences to be drawn therefrom, in favor of the petitioner.[9] We do so, noting our recent rejection of the heightened

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[5] *DeAnzona v. City and County of Denver*, 222 F.3d 1229, 1233-34 (10th Cir.2000) (citing *Johnson v. Martin*, 195 F.3d 1208, 1214 (10th Cir.1999)).

[6] *Tonkovich v. Kansas Bd. of Regents*, 159 F.3d 504, 516 (10th Cir.1998).

[7] *Romero v. Fay*, 45 F.3d 1472 (10th Cir.1995); *see also Mick v. Brewer*, 76 F.3d 1127 (10th Cir.1996) (discussing principle that a district court's denial of qualified immunity is appealable to the extent it presents issues of pure law).

[8] *Gagan v. Norton*, 35 F.3d 1473, 1475 (10th Cir.1994).

[9] *See Sutton v. Utah State School for the Deaf and Blind*, 173 F.3d 1226, 1236 (10th Cir.1999).

pleading standard in the context of a qualified immunity defense.[10]

1. Violation of a Constitutional Right

Initially we consider whether the plaintiffs have asserted the violation of a constitutional right.[11] On its face their pleadings implicate a constitutional right. In *Youngberg*, the Supreme Court held that a committed individual "enjoys constitutionally protected interests in conditions of reasonable care and safety, reasonably nonrestrictive confinement conditions, and such training as may be required by these interests."[12] There is no challenge to the plaintiffs' status as committed individuals. The right discussed in *Youngberg* is therefore pertinent herein.[13] Our inquiry at this stage turns on whether the allegations related to the conditions and treatment at CMHI-P, if proven, would constitute a violation of the right outlined in *Youngberg*.

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[10] *Currier v. Doran*, 242 F.3d 905, 2001 WL 202045 (10th Cir. March 1, 2001).

[11] *Siegert v. Gilley*, 500 U.S. 226, 232 (1991).

[12] *Youngberg v. Romeo*, 457 U.S. 307, 324 (1982).

[13] *See also Washington v. Harper*, 494 U.S. 210, 227 (1990) (finding that patients have a due process interest implicated by the unconsented administration of antipsychotic medications absent a finding that they are a danger to themselves or others); *Walters v. Western State Hosp.* 864 F.2d 695, 700 (10th Cir.1988) (discussing patients' liberty interest in being forcibly detained without access to outside family or friends).

While this presents a close question, we ultimately conclude that plaintiffs' second amended complaint sufficiently alleges a violation of a clearly established constitutional right. As above noted, mere conclusionary allegations without specific facts will not defeat the defense of qualified immunity. The amended complaint passes muster when tested against this requirement.

Neiberger complains of a "continuous pattern of substandard care," including denial of his right to "refuse treatment that is inappropriate for his needs," deprivation of a "physician-ordered, nutritionally adequate vegetarian diet," the forced discontinuance of an educational program, and interference with his "visitation and involvement of his family in his care." Eldridge complains of being "penalized and retaliated against for refusing generic group therapy," being "repeatedly subjected to restraints and seclusion when he was neither dangerous to himself or others," "prevented from conferring with legal counsel and maintaining possession of his legal files," and the disregard of a court order that he be allowed to continue his education.

Gardner alleges misdiagnosis and threats of involuntary psychotropic drugs, being subjected to body searches by female staff contrary to hospital policy, and denial of meaningful or timely response to grievances filed in accordance with hospital rules. Finally, Jacobs asserts misdiagnosis of his condition due to personal conflicts with one named doctor, that he remains in the maximum security unit despite findings by another named doctor, that he has no behavior conflicts or evidence of any form of mental illness, the lack of any formalized grievance system in the forensic unit, placement in seclusion for

challenging inappropriate treatment, unlawful "pat-frisks" by female staff, and placement in an unsafe environment with a patient who had previously threatened him.

Finally, plaintiffs cite "consultant reports commissioned by defendant Colorado Department of Human Services." These reports detail the overcrowding and understaffing at CMHI-P, the lack of training of staff in areas such as suicide prevention and the treatment of the "severely mentally ill population served by the maximum-security unit," and "dangerously unsafe" conditions. Plaintiffs also discuss surveys by the Health Care Financing Administration finding "serious staffing and other deficiencies at CMHI-P which substantially limit the hospital's capacity to provide adequate care."

While these allegations do not contain specific dates and times, or intimate details of each alleged infraction, they do describe adequately the various incidents and conduct that constitute the deprivation. The allegations do more than merely "identif[y] a clearly established right and then alleg[e] that the defendant has violated it."[14] In addition to stating that defendants provided "insufficient care" or "poor treatment", the allegations note problems with the care, such as punishment for lodging complaints, inability to visit with family or friends, and invasive searches by staff of the opposite sex. On balance, we find sufficient factual allegations as to the

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[14] *Sawyer v. County of Creek*, 908 F.2d 663, 665 (10th Cir.1990).

constitutional violation issue. Plaintiffs' remaining Section 1983 claims do not state a violation of a clearly-established constitutional right.[15]

2. Clearly Established Right

Our second inquiry focuses on whether the right allegedly violated is "sufficiently clear that a reasonable official would understand that what he is doing violates that right."[16] We find that plaintiffs have met this second requirement. Both Toerber and Hawkins serve in high ranking positions within the health care administration in the state of Colorado. A reasonable person in such a position should know that committed individuals enjoy a constitutionally protected interest in conditions of reasonable care and safety, and that allowing or implementing policies resulting in the acts alleged in the complaint would violate that interest. We therefore conclude that plaintiffs' constitutional rights were clearly established and that reasonable persons in the defendants' positions should have and would have known that their conduct violated that right.[17]

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[15] *See* Second Am.Compl., App. at 32 §§ 81-83 (alleging violations of due process rights to individualized treatment plans, to have family participation in treatment and care, to confinement in the least restrictive environment, and to be informed of potential risks and benefits of voluntarily-taken psychotropic medications).

[16] *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

[17] *See Tonkovich v. Kansas Bd. of Regents*, 159 F.3d 504, 516 (10th Cir.1998).

Defendants also urge dismissal by reading the plaintiffs' complaint as based on *respondeat superior* liability rather than actual participation in the violation. We are not persuaded. The complaint contains sufficient facts for establishment of defendants' personal liability. There are several allegations relating to defendants' knowledge of the improper treatment at CMHI-P, their acquiescence in such treatment, and their supervisory roles over the implementation and administration of care at CMHI-P.[18] These allegations do not focus on *respondeat superior* liability but, rather, would place responsibility for the alleged constitutional violations on the defendants' directly in light of their participation in the establishment of plaintiffs' and other patients' treatment programs and overall living conditions at CMHI-P.

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[18] As noted by the district court, plaintiffs' second amended complaint includes allegations that Hawkins "has been and continues to be personally aware of the conditions at CMHI-P and the lack of adequate medical and psychiatric care and treatment provided to the patients at CMHI-P" (par. 33), that Toerber is "personally aware of the conditions at CMHI-P and the inadequate medical and psychiatric care and treatment provided to the patients held at CMHI-P" (par. 35), that defendants have operated the CMHI-P in a manner that consciously and systematically deprives plaintiffs of appropriate care (par. 59), and finally that both defendants had "actual notice from planning documents developed and published by CMHI-P that the level of staffing in the forensic unit was not adequate . . . to provide the minimally adequate treatment guaranteed by the United States Constitution. Despite this knowledge, Defendants, including Defendants Toerber and Hawkins, failed to take reasonable actions to maintain sufficient levels of trained professional staff. . . . " (par. 63).

We conclude that the factual allegations in plaintiffs' complaint are sufficient to survive defendants' 12(b)(6) motion to dismiss.

B. Negligence

Defendants also appeal the district court's ruling denying their motion to dismiss the claim for common law negligence. Under Colorado law, because defendants are employees of a state entity, tort actions must comply with the Colorado Governmental Immunity Act.[19] The district court held that governmental immunity was waived under the act because the complaint alleged negligence in the operation of a public hospital.[20] Defendants assert various grounds for challenging the district court's decision, none of which persuades us that the district court's order was in error.

At the outset, we note our agreement with the district court that plaintiffs' complaint contains sufficient allegations of individual negligence. *Respondeat superior* liability is not implicated. Despite defendants' urgent argument, we find no requirement that a plaintiff show willful and wanton conduct on behalf of a defendant when the alleged negligence involves the operation of a hospital. The statute at issue provides this exemption.[21]

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[19] *See* Colo.Rev.Stat. § 24-10-102 (1990) (containing "all the circumstances under which the state, any of its political subdivisions, or the public employees of such public entities may be liable in actions which lie in tort").

[20] *See* Colo.Rev.Stat. § 24-10-106(b) (1990).

[21] Colo.Rev.Stat. § 24-10-118(2)(a) (1990).

Finally, we conclude that the plaintiffs sufficiently complied with the CGIA notice requirements. They filed a certificate of review[22] which adequately complies with the requirements of C.R.S. § 13-20-602(3)(a).[23] Colorado law does not require plaintiffs to reference the Not Guilty By Reason of Insanity statute[24] in their certificate, as the duties they refer to in their complaint stem from the Treatment Act. Further, as noted by the district court, the Colorado Supreme Court has held that a plaintiff need only substantially comply with the CGIA's notice provisions.[25] This comports with a recent opinion by that court which concludes that the CGIA's waiver provisions

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[22] The district court discussed the certificate in light of the requirements in § 24-10-10. This section requires that plaintiffs obtain notices containing (1) the name and address of complainant and his attorney, (2) a concise statement of facts underlying the claim, including the date, time, place, and circumstances of the act, omission, or event complained of, (3) the name and address of any public employee involved, (4) a concise statement of the nature and extent of the injury, and (5) a statement of the monetary damages requested. Plaintiffs' certificate met these requirements.

[23] This section requires that attorney's declare that they have consulted with a person who has expertise in the area at issue and that such expert has reviewed the case and concluded that the filing of the claim does not lack substantial justification. *See* Colo.Rev.Stat. § 13-20-602(3)(a)(I) & (II) (1990). The statute does not require the naming of any particular licensed professional because the instant complaint charges the defendants with negligence.

[24] *See* Colo.Rev.Stat. § 16-8-101 *et. seq.* (1990).

[25] *Woodsmall v. Regional Transport. Dist.*, 800 P.2d 63, 69 (Colo.1990).

receive deferential construction in favor of injured victims and its "immunity provisions are subject to strict construction."[26] We find the district court's reasoning sound and affirm its denial of defendants' motion to dismiss.

In conclusion, we find that plaintiffs have alleged sufficient facts to rebut defendants' assertion of qualified immunity and that their notice complied with the requirements of the CGIA. The judgment appealed is AFFIRMED.

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[26] *Walton v. State*, 968 P.2d 636, 643 (Colo.1998).

United States District Court,
D. Colorado.

James **NEIBERGER**, Danford Eldridge, Paul Gardner, and Terence Jacobs,

Plaintiffs,

v.

Robert HAWKINS, individually and in his official capacity as Superintendent of the Colorado Mental Health Institute at Pueblo; Garry Toerber, individually and in his official capacity as Associate Manager for the Office of Direct Services of the Department of Human Services; Colorado Department of Human Services; and Colorado Mental Health Institute at Pueblo, Defendants.

No. Civ.A. 99-B-1120.

Nov. 12, 1999.

Slyvia [sic] V. Kirk, Englewood, CO, David H. Miller, Miller Lane Killmer & Greisen LLP, Denver, CO, Kathleen Mullen, Law Office of Kathleen Mullen, P.C., Denver, CO, for plaintiffs.

Cathy Havener Greer, Pamela Skelton, Ritsema & Lyon, P.C., Denver, CO, for defendants.

MEMORANDUM OPINION AND ORDER

BABCOCK, District Judge.

In this action brought by patients of the Forensic Institute at the Colorado Mental Health Institute at Pueblo (the "CMHI-P"), Defendants, Robert Hawkins, Garry Toerber, the Colorado Department of Human Services (the "DHS"), and the CMHI-P (collectively "Defendants"), move to dismiss Plaintiffs' second amended

complaint. Plaintiffs, James Neiberger, Danford Eldridge, Paul Gardner, and Terence Jacobs (collectively "Plaintiffs"), oppose this motion. The issues are adequately briefed and orally argued. For the reasons set forth below, I grant in part and deny in part Defendants' motion to dismiss. I hold the motion in abeyance as to Plaintiffs' Americans with Disabilities Act ("ADA") claim. Jurisdiction is proper in this Court pursuant to 28 U.S.C. §§ 1331, 1441, and 1443, original federal question jurisdiction and removal.

I.

Plaintiffs are patients in the CMHI-P pursuant to respective adjudications of not guilty by reason of insanity. C.R.S. § 16-8-105. They bring this action alleging a combination of hostile conditions and policies that prevent them from obtaining appropriate medical and psychiatric care. Defendant Robert Hawkins is the Superintendent of the CMHI-P. Plaintiffs allege that Mr. Hawkins, in his official capacity, is responsible for ensuring that the CMHI-P provides care and treatment consistent with statutory and constitutional standards. Plaintiffs further allege that Mr. Hawkins was personally aware of the inadequate care provided to patients at the CMHI-P. Defendant Garry Toerber is the Associate Manager for the Office of Direct Services of the DHS and is the Director of the Pueblo state psychiatric hospital. As the Director, Mr. Toerber is allegedly responsible for overseeing all aspects of the operations and is thus allegedly responsible for ensuring that patients at the CMHI-P receive proper medical and psychiatric treatment. Plaintiffs also allege that Mr. Toerber was personally aware of

the inadequate conditions at the CMHI-P. The DHS is the state agency responsible for the administration of the state's psychiatric hospitals, including the CMHI-P.

Plaintiffs brought this action in the Colorado District Court for the City and County of Denver. Defendants removed to this Court based on federal question jurisdiction. 28 U.S.C. §§ 1331, 1441. Plaintiffs assert the following claims for relief:

(1) Violation of Colorado's Care and Treatment of the Mentally Ill Act, C.R.S. § 27-10-101;

(2) Violation of the Due Process Clause of the Fourteenth Amendment pursuant to 42 U.S.C. § 1983;

(3) Violation of the ADA; and

(4) Negligence.

II.

Defendants do not specify the provisions of Rule 12 under which they move to dismiss Plaintiffs' claims. However, in light of their arguments, the only applicable provisions are Rules 12(b)(1) and 12(b)(6).

A motion to dismiss based on sovereign immunity is treated as a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1). See *King v. United States*, 53 F.Supp.2d 1056, 1064 (D.Colo.1999); see also *Trinity Broadcasting of Denver, Inc. v. City of Westminster*, 848 P.2d 916, 924 (Colo.1993) (immunity under the Colorado Governmental Immunity Act is a jurisdictional issue). Under Rule 12(b)(1), I have wide discretion to consider affidavits, documents, and even hold a limited

evidentiary hearing in making appropriate factual findings on jurisdictional issues. See *Wheeler v. Hurdman*, 825 F.2d 257, 259 n. 5 (10th Cir.1987). In deciding whether sovereign immunity has been waived, I may receive any competent evidence pertaining to the motion, including evidence outside the pleadings, without converting it into a summary judgment motion. See *Trinity Broadcasting*, 848 P.2d at 924-25. Further, "[a]ny factual dispute upon which the existence of jurisdiction may turn is for the court alone, and not a jury to determine." *Id.* The burden of establishing subject matter jurisdiction is on the party asserting jurisdiction. See *Basso v. Utah Power & Light Co.*, 495 F.2d 906, 909 (10th Cir.1974). Therefore, Plaintiffs have the burden of showing that Defendants are not immune from suit. See *Trinity*, 848 P.2d at 925.

For purposes of considering Defendants' motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6), I have not considered any evidence outside of the pleadings. See *Sutton v. Utah State School for Deaf and Blind*, 173 F.3d 1226, 1236 (10th Cir.1999). In evaluating a 12(b)(6) motion to dismiss,

> all well-pleaded factual allegations in the amended complaint are accepted as true and viewed in the light most favorable to the nonmoving party. . . . "A 12(b)(6) motion should not be granted 'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' " . . . "The court's function on a Rule 12(b)(6) motion is not to weigh potential evidence that the parties might present at trial, but to assess whether the plaintiff's complaint alone

> is legally sufficient to state a claim for which relief may be granted."

Id. (internal citations omitted).

III.

A. Violation of Colorado's Care and Treatment of the Mentally Ill Act.

Plaintiffs' first claim is pursuant to the Care and Treatment of the Mentally Ill Act. C.R.S. § 27-10-101, et seq. ("Treatment Act"). In their second amended complaint, Plaintiffs allege that Defendants have substantially violated Plaintiffs' rights secured by the Treatment Act by, among other things: failing to provide individualized medical and psychological evaluations and treatment plans; failing to progress Plaintiffs to lesser-restrictive environments; failing to inform Plaintiffs of the risks and benefits of psychotropic medication; failing to follow required procedural safeguards for the administration of forced medication without consent; failing to provide Plaintiffs with a safe and therapeutic environment; retaliating against Plaintiffs' assertions of their rights; interfering with Plaintiffs' mail, right to counsel, and visitation; subjecting Plaintiffs to belittling and abusive treatments; and depriving Plaintiffs of basic human needs. (Complaint, § 75). As a result of these alleged actions and omissions, Plaintiffs contend they have suffered immediate and irreparable injuries. Plaintiffs seek an injunction and compensatory damages.

Defendants move to dismiss this claim on several grounds. First, Defendants submit that I should decline jurisdiction over this claim due to the Colorado courts'

continuing jurisdiction. Second, Defendants argue that Plaintiffs are not entitled to the Treatment Act's protections. Finally, in the alternative, Defendants move to dismiss Plaintiffs' claim to the extent it seeks damages.

1. Exercise of Jurisdiction

Plaintiffs were committed to the CMHI-P pursuant to Colorado criminal statutes. See, e.g., C.R.S. § 16-8-105(4) ("If the trier of fact finds the defendant not guilty by reason of insanity, the court shall commit the defendant to the custody of the department of human services until such time as he is found eligible for release. . . . "). The Colorado Supreme Court has held that committing courts retain jurisdiction over claims by persons adjudicated "not guilty by reason of insanity" ("NGRI patients"):

> We are satisfied that Colorado's statutory scheme for the automatic commitment of criminal defendants adjudicated not guilty by reason of insanity manifests a clear legislative intent to vest the committing court with subject matter jurisdiction to resolve questions relating to the treatment needs of the committed defendant and that such jurisdiction continues until such time as the defendant is unconditionally released from the order of commitment.

People v. Gilliland, 769 P.2d 477, 479-480 (Colo.1989) (en banc).

Because committing courts retain jurisdiction over questions relating to the treatment needs of NGRI patients, Defendants urge that I decline subject matter jurisdiction over this claim because the state court is the more appropriate forum. (Motion to Dismiss, p. 12).

Defendants do not claim, however, that this Court lacks subject matter jurisdiction over this claim. Indeed, Defendants chose to remove all claims from state court here based on original federal question jurisdiction over Plaintiffs' ADA and § 1983 claims. In the Notice of Removal, Defendants concede, as they must, that state law claims are no impediment to removal, citing 28 U.S.C. § 1441(c) ("Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein").

However, Defendants now suggest that I abstain from Plaintiffs' first claim for relief under Colorado's Treatment Act because the state forum is more appropriate. In *Gilliland*, the Colorado Supreme Court enforced continuing state jurisdiction in a suit involving a single defendant forced to take medication. Unlike *Gilliland*, this case is a putative class action raising questions of the treatment of the entire CMHI-P patient population. With regard to the named Plaintiffs alone, three different courts committed them to the care of the CMHI-P. (Plaintiffs' Response to Motion to Dismiss, p. 12). The proposed class consists of more than 250 additional patients. This case does not involve retaining jurisdiction over the treatment of a single patient, but is an independent action brought by numerous Plaintiffs attacking Defendants' treatment of mentally ill persons committed to the CMHI-P. Plaintiffs should not be forced to bring separate causes of action in the various committing courts. Further, in addition to state law claims, this case involves issues of

federal law. Defendants' proposal that I decline jurisdiction would unnecessarily foster piecemeal litigation.

Defendants also cite, without discussion, the Burford and Younger abstention rules in support of their argument that I abstain from hearing this claim. See *Taylor v. Jaquez*, 126 F.3d 1294, 1297 (10th Cir.1997) ("Younger . . . commands a federal court to abstain from exercising jurisdiction when three conditions have been established. First, there must be ongoing state criminal, civil, or administrative proceedings. Second, the state court must offer an adequate forum to hear the federal plaintiff's claims from the federal lawsuit. Third, the state proceeding must involve important state interests, matters which traditionally look to state law for their resolution or implicate separately articulated state policies."); *Walker Operating Corp. v. F.E.R.C.*, 874 F.2d 1320, 1330 (10th Cir.1989) ("Burford-type abstention is deference by a federal court in order to avoid needlessly interfering in state activities."). Abstention must be employed sparingly:

> Abstention from the exercise of federal jurisdiction is the exception, not the rule. "The doctrine of abstention, under which a District Court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it. Abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the state court would clearly serve an important countervailing interest." "(I)t was never a doctrine of equity that a

> federal court should exercise its judicial discretion to dismiss a suit merely because a State court could entertain it."

Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 813-814, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976) (internal citations omitted). Defendants have failed to persuade me to abstain from hearing this claim. They identify no overriding state interests or matters which traditionally look to state law for resolution. Further, Defendants do not claim that I would needlessly be interfering with state activities by hearing this claim. Finally, Plaintiffs argue, and Defendants do not contest, that this action, involving a potential Plaintiff class, does not involve the same parties or issues as cases under the continuing jurisdiction of numerous state committing courts.

Exercising jurisdiction over Plaintiffs' claim under the Treatment Act is an appropriate exercise of supplemental jurisdiction. 28 U.S.C. § 1367(a). Defendants' request for abstention is particularly inappropriate where, as here, Defendants chose to remove this case to federal court in the first instance. Furthermore, resolution of this case will require application of both federal and state law. I exercise my discretion to retain original and supplemental jurisdiction over Plaintiffs' claims, and therefore, I deny Defendants' motion to dismiss Plaintiffs' Treatment Act claim.

2. Plaintiffs' Entitlement to Protection under the Treatment Act

Defendants next contend that Plaintiffs, as NGRI patients, are not covered by the Treatment Act. In their second amended complaint, Plaintiffs assert that, as patients committed to a mental health facility, they have rights under the Treatment Act. C.R.S. § 27-10-116(1)(a). (Second Amended Complaint, § 44). This statute states, in relevant part:

> Any person receiving evaluation or treatment under any of the provisions of this article is entitled to medical and psychiatric care and treatment . . . suited to meet his individual needs, delivered in such a way as to keep him in the least restrictive environment, and delivered in such a way as to include the opportunity for participation of family members in his program of care and treatment when appropriate, all subject to available appropriations. Nothing in this paragraph (a) shall create any right with respect to any person other than the person receiving evaluation, care, or treatment. . . .

Defendants contend that under this provision, Plaintiffs are entitled to the Treatment Act's protections only if they were committed under its provisions. I do not read this requirement into the above language.

Defendants argue that there are significant differences between commitment under the criminal process and the civil process and, therefore, different standards of care apply to these patients. In support, Defendants cite Colorado case law finding that differences between criminal and civil commitment standards and procedures for

commitment and release do not create equal protection violations. See *People v. Chavez*, 629 P.2d 1040, 1045 Colo.1981) ("We also conclude that the differences in the commitment procedures and standards of release for criminal and civil commitments do not violate equal protection of the laws."). In *Chavez*, the Colorado Supreme Court found no equal protection violation in the different procedures employed in civilly committing persons under the Treatment Act as opposed to persons adjudicated criminally insane. The *Chavez* Court reasoned: "The assertion of the insanity defense and the judicial determination implicit in the insanity adjudication that the accused engaged in criminal conduct as a result of mental disease or a questionable state of legal sanity place the legally insane defendant in a special class of persons posing an imminent danger to public safety if immediately released from detention." *Chavez*, 629 P.2d at 1053. The Court also noted and approved the differences in standards for release. See *id.* Similarly, the United States District Court for the District of Colorado held:

> Criminal committees and potential involuntary civil committees are not similarly situated groups. Although the state ultimately seeks to care for and treat psychiatrically both groups after commitment to a state facility, petitioners ignore important differences that permit different statutory treatment. A criminal offense has occurred, and the defendant has confessed that he committed the offense through his voluntary plea of not guilty by reason of insanity. A court has determined that probable cause exists to believe that the defendant committed the act, and the defendant has been found not guilty by reason of insanity at a trial of the sanity issue.

> These differences dramatically distinguish the involuntary civil committee and make an equal protection comparison inappropriate.

Glatz v. Kort, 650 F.Supp. 191, 199 (D.Colo.1984), aff'd. by *Glatz v. Kort*, 807 F.2d 1514 (10th Cir.1986).

However, Plaintiffs are not challenging unequal procedures governing their commitment and release. The issue here is, once committed, should the standards of care in the Treatment Act apply both to civilly and criminally committed persons. Colorado case law does not directly address this issue. I conclude that the Treatment Act should apply to both types of committees.

I look first to principles of statutory construction. In construing statutory provisions, [a court] should give effect to the intent of the legislature. [A court] must look first to the statutory language itself, giving words and phrases their commonly accepted meaning. Where the language of a statute is plain and the meaning is clear, [a court] need not resort to interpretive rules of statutory construction, but must apply the statute as written.

Univex Internat'l, Inc. v. Orix Credit Alliance, Inc., 914 P.2d 1355, 1358 (Colo.1996) (internal citations omitted). Nothing in the express language of the Treatment Act suggests that its application is limited to those civilly committed or that criminally and civilly committed persons are treated under different standards of care. The stated purposes of the Treatment Act include: "To secure for each person who may be mentally ill such care and treatment as will be suited to the needs of the person and to insure that such care and treatment are skillfully and humanely administered with full respect for the person's

dignity and personal integrity." C.R.S. § 27-10-101(1)(a) (emphasis added). Also, C.R.S. § 27-10-116(1)(a) states that the standards apply to "any person receiving evaluation or treatment under any of the provisions of this article." A further provision specifically contemplates treatment for NGRI patients, C.R.S. § 27-10-111(4.5), indicative of legislative intent that the Treatment Act applies to NGRI patients. See *Goebel v. Colorado Dep't of Institutions*, 830 P.2d 1036, 1040 (Colo.1992) ("The words 'any person' and 'any of the provisions' manifest the legislature's intent to provide mental health services on a broad basis."). Notably, the NGRI criminal commitment statute, C.R.S. § 16-8-101, et. seq., provides no standards for care and treatment, but contains procedural guidelines only. It would be unreasonable to conclude that the Colorado General Assembly intended to provide no standards of care for NGRI patients.

The Treatment Act broadly defines "mentally ill person" as "a person with a substantial disorder of the cognitive, volitional, or emotional processes that grossly impairs judgment or capacity to recognize reality or to control behavior." C.R.S. § 27-10-102(7) (emphasis added). In interpreting this provision, Colorado courts have held that, "the apparent legislative intent was to provide services to all mentally ill persons as defined." *Goebel v. Colorado Dep't of Institutions*, 830 P.2d 1036, 1042 (Colo.1992) (determining that Treatment Act covers involuntary and voluntary committees) (emphasis added). This language does not exclude NGRI persons.

The statutes' structure itself indicates that criminally committed patients are entitled to the protections of the Treatment Act. Title 27 is entitled "Institutions."

There are five general sections within this title. The first is "Department of Human Services." C.R.S. § 27-1-104(a) lists the CMHI-P as an institution supervised, managed, and controlled by the DHS. The second, "Mental Illness and Defects," contains the Treatment Act. This second section also lists the included institutions and has an article thirteen specifically creating the CMHI-P. On the other hand, Title 16 is entitled "Criminal Proceedings" and includes the code of criminal procedure. This contains the NGRI procedural provisions regarding insanity, incompetence, commitment, and release. C.R.S. § 16-8-101, et seq. However, Title 16 provides no standards for the operation of the facilities or the care of NGRI patients.

In addition to the above, this Court has held that criminal committees are to be afforded the same level of medical care provided to civil committees. See *Romero v. Schauer*, 386 F.Supp. 851, 860-861 (D.Colo.1974) (Arraj, J.) ("the State of Colorado by statute explicitly guarantees a right to psychiatric treatment to all persons committed to the state hospital, whether the commitment is the result of a civil proceeding or of a verdict of not guilty by reason of insanity in a criminal case."). I agree that criminally committed patients are entitled to the same degree of care as civilly committed patients.

Defendants acknowledge that civilly committed patients receive care pursuant to the Treatment Act. (Motion to Dismiss, p. 8). Therefore, criminally committed patients are due the same level of protection. See, e.g., *Gilliland*, 769 P.2d at 483 ("A person committed to the Department of Institutions for care and treatment as the result of an insanity adjudication is entitled to the same

general quality of treatment available to a civilly committed patient."); *Kort v. Carlson*, 723 P.2d 143, 148 (Colo.1986) ("Construing the criminal commitment provisions to establish a right to treatment is consistent with the statutory language and its purpose of restoring persons criminally committed to competency if possible. Furthermore, a right to treatment for a criminally committed person is consistent with the broad purpose of the civil commitment statutes to 'secure for each person who may be mentally ill such care and treatment as will be suited to the needs of the person. . . . ' Finally, recognition that the involuntarily committed have a statutory right to treatment is in accord with the widely accepted view that the right has a constitutional foundation."); *Chavez*, 629 P.2d at 1048 (Court notes that the statutory scheme governing criminal committees "contemplates that the defendant's present need for care and treatment . . . will be addressed.").

Defendants contend that this established Colorado law stands for the narrow proposition that although NGRI committees may be entitled to the same general quality of treatment as others committed to the state's care, the Treatment Act does not apply to them. (Defendants Reply in support of Motion to Dismiss, p. 6). I disagree. **I hold that the Treatment Act and its general standards of care apply to persons adjudicated and committed as NGRI. Thus, Plaintiffs, as NGRI patients, assert a cognizable claim for violation of the Treatment Act.**

3. Plaintiffs' Entitlement to Damages under the Treatment Act

In their claim for violation of the Treatment Act, Plaintiffs seek compensatory damages for alleged "physical injuries, pain and suffering, severe emotional distress, unlawful deprivation of liberty, degradation and deprivation of the quality of their lives." (Second Amended Complaint, § 78). However, Plaintiffs do not possess a private right of actions for damages under the Treatment Act.

Goebel v. Colorado Dep't of Institutions, 764 P.2d 785 (Colo.1988) (en banc), involved a class action on behalf of mentally ill persons residing in Denver, challenging the adequacy of mental health care. Those plaintiffs sought declaratory and injunctive relief as well as damages. The trial court dismissed all of the claims for relief. See *id.* at 787. In dismissing the claim for damages the trial court stated that, "the Care and Treatment Act 'provides neither an express nor an implied cause of action for damages' ". *Id.* at 792 (internal citations omitted). Upon review of this dismissal, the Colorado Supreme Court stated, in relevant part:

> The trial court dismissed this claim, concluding that the Care and Treatment Act "provides neither an express nor an implied cause of action for damages." We agree with the court's conclusion that the legislature did not intend to provide for enforcement by individual claims for damages.

Id. at 799, fn. 16 (emphasis added).

Despite Plaintiffs' arguments to the contrary, I conclude that the Colorado Supreme Court's pronouncement is binding. The *Goebel* Court squarely determined that a claim for damages is not allowed under the Treatment Act. Therefore, I grant Defendants' motion to dismiss Plaintiffs' Treatment Act claim, but only to the extent that it requests compensatory damages.

B. Due Process Claim pursuant to 42 U.S.C. § 1983

In their second claim for relief, Plaintiffs allege a 42 U.S.C. § 1983 Fourteenth Amendment Due Process violation against the DHS, the CMHI-P, Robert Hawkins (both individually and in his official capacity), and Garry Toerber (individually and in his official capacity). (Second Amended Complaint, §§ 79-89). Section 1983 provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

"Section 1983 does not create substantive rights. Rather it provides a recovery mechanism for deprivation of a federal right. To establish a cause of action under section 1983, a plaintiff must allege (1) deprivation of a federal right by (2) a person acting under color of state law." *Watson v. City of Kansas*, 857 F.2d 690, 694 (10th Cir.1988)

(emphasis added) (citing *Gomez v. Toledo*, 446 U.S. 635, 640, 100 S.Ct. 1920, 64 L.Ed.2d 572 (1980)).

In their response to Defendants' motion to dismiss Plaintiffs admit that,

> Defendants correctly point out that a state is not a "person" for purposes of section 1983. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 64, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989). Therefore, Plaintiffs concede that they cannot sue the state for any relief or the official capacity Defendants for monetary relief under section 1983.

Therefore, I grant, as confessed, Defendants' motion to dismiss the § 1983 claim against the DHS, the CMHI-P, and the official capacity Defendants to the extent that monetary relief is requested. Mr. Hawkins and Mr. Toerber are appropriate Defendants in their official capacity under § 1983 for prospective, injunctive relief only. See *Will*, 491 U.S. at 71, 109 S.Ct. 2304, fn. 10 ("Of course a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because 'official-capacity actions for prospective relief are not treated as actions against the State.' "). Finally, Mr. Hawkins and Mr. Toerber, as individuals, are "persons" subject to suit under § 1983. See *Hafer v. Melo*, 502 U.S. 21, 30-31, 112 S.Ct. 358, 116 L.Ed.2d 301 (1991).

Defendants challenge the § 1983 Due Process claim against the remaining Defendants. First, they argue that the claims are barred against the individual Defendants in their official capacities by the doctrine of Eleventh Amendment sovereign immunity. Second, they contend that the individual Defendants, sued in their individual capacities, are entitled to qualified immunity.

1. Sovereign Immunity

The Eleventh Amendment provides for the sovereign immunity of a state or state actors sued in federal court. See *ANR Pipeline Co. v. Lafaver*, 150 F.3d 1178, 1187 (10th Cir.1998). This immunity can bar any form of relief that a citizen might request in a suit against a state, even a suit solely for prospective injunctive relief when brought against a state or state agency. See *id.* (citing *Cory v. White*, 457 U.S. 85, 90, 102 S.Ct. 2325, 72 L.Ed.2d 694 (1982)). Further, as Plaintiffs concede, "when a suit seeks money damages against an official of a state agency, suing that official in his or her official capacity, then the 'real party in interest' is the state, and the suit is barred by the Eleventh Amendment." *Id.*

There are three exceptions to the doctrine of sovereign immunity: (1) "A state may waive its Eleventh Amendment immunity by consenting to be sued, but only in the clearest and most unmistakable terms," (2) "Congress may abrogate the states' Eleventh Amendment immunity, but again, only by using the clearest and most unmistakable terms, and only when Congress is exercising a power granted to it by a constitutional amendment post-dating the Eleventh Amendment, i.e., principally section 5 of the Fourteenth Amendment," and (3) the *Ex parte Young* exception. *Id.* at 1188. Under *Ex parte Young*, in a suit against a state official, "when a party seeks only prospective equitable relief – as opposed to any form of money damages or other legal relief – then the Eleventh Amendment generally does not stand as a bar to the exercise of the judicial power of the United States." *Id.* ("when an official of a state agency is sued in his official capacity for prospective equitable relief, he is generally

not regarded as 'the state' for purposes of the Eleventh Amendment and the case may proceed in federal court.").*

As noted above, a state may waive its Eleventh Amendment immunity by consenting to suit, but only in the clearest and most unmistakable terms.

See *ANR Pipeline*, 150 F.3d at 1187 (10th Cir.1998). Plaintiffs originally filed this action in state court. Defendants then removed to federal court. The Tenth Circuit has held that the Eleventh Amendment defense can be waived when a Defendant removes a case from state to federal court.

See *Sutton*, 173 F.3d at 1234 (citing *Gallagher v. Continental Ins. Co.*, 502 F.2d 827, 830 (10th Cir.1974)). "[A]n unequivocal intent to waive immunity seems clear when a state, facing suit in its own courts, purposefully seeks a federal forum." *Id.* Here, like in *Sutton*, the invocation of federal court jurisdiction was by Defendants' own counsel. However, I cannot conclude that this removal is an unequivocal waiver of sovereign immunity. In their Notice of Removal, Defendants expressly provide that:

> By removal, Defendants do not waive any right to assert, or the protection of, any available constitutional, statutory, common law, or other provision that does, might, or could limit the Court's jurisdiction of the allegations of Plaintiffs' Complaint or any proposed amendment thereto, including allegations of entitlement to relief thereunder.

This express reservation is contrary to an unequivocal waiver of Defendants' sovereign immunity defense. Furthermore, in *Sutton*, where the Tenth Circuit found

that removal constituted waiver, the Defendant failed to immediately raise its Eleventh Amendment defense. See *Sutton*, 173 F.3d at 1235 fn. 8. And significantly, since the Tenth Circuit's decision in *Sutton*, the Supreme Court expressed disfavor with implied waiver. See *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, ___, 119 S.Ct. 2199, 2204, 144 L.Ed.2d 575 (1999). For these reasons, Defendants' removal was not an "extraordinarily effective waiver" of Eleventh Amendment sovereign immunity. See *Richins v. Industrial Constr., Inc.*, 502 F.2d 1051, 1056 (10th Cir.1974).

Plaintiffs also maintain that the action against the official capacity Defendants requesting only future injunctive relief is squarely within the exception provided by *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908); see also *ANR Pipeline*, 150 F.3d at 1188 ("when an official of a state agency is sued in his official capacity for prospective equitable relief, he is generally not regarded as 'the state' for purposes of the Eleventh Amendment and the case may proceed in federal court."). However, the Tenth Circuit has outlined the following exceptions to the *Ex parte Young* doctrine:

> First, federal courts have no jurisdiction to entertain a suit that seeks to require the state official to comply with state law – only allegations of violations of federal law are sufficient to come within the *Ex parte Young* rule. . . . Second, the doctrine will not go so far as to allow federal jurisdiction over a suit that seeks to redress past wrongs – only ongoing violations are covered . . . . Third, the doctrine does not allow a federal

> court to declare past state conduct unconstitutional when the only purpose for such a declaratory judgment would be its res judicata effect in a subsequent state-court proceeding; such a declaration would have the effect of adjudicating the liability issues in a damages action against the state even though a direct federal suit for damages would be barred by the Eleventh Amendment. And fourth, although the doctrine will allow injunctive relief that might have a substantial ancillary effect on a state treasury, it does not allow an award for monetary relief that is the practical equivalent of money damages, even if this relief is characterized as equitable.

Id. at 1188-1189 (internal citations omitted).

Defendants argue that Plaintiffs seek recourse for alleged past violations contrary to *Ex parte Young*. See *id.* Plaintiffs concede, however, that they seek relief against the individual Defendants in their official capacities "for prospective, injunctive relief" only. (Response, p. 15). Therefore, any allegations in their complaint seeking recourse for alleged past violations is now moot or withdrawn. This comports with Tenth Circuit law. *Id.* at 1191 ("The *Ex parte Young* doctrine applies only to continuing wrongs."). No other exception to the *Ex parte Young* doctrine applies here.

Finally, Defendants argue that federal jurisdiction should not be exercised because of the "improper collateral attack attempted by Plaintiffs on the ongoing jurisdiction of Plaintiffs in state criminal courts." (Motion to Dismiss, p. 17). Because state courts retain continuing jurisdiction over NGRI patients, *Jacobs*, 869 P.2d at 214, Defendants argue that the *Ex parte Young* exception

should not apply because core state sovereign interests are implicated.

See *ANR Pipeline*, 150 F.3d at 1193 ("we must not extend the *Ex parte Young* doctrine to allow a suit for prospective equitable relief when that relief would be just as intrusive, if not more so, into core aspects of a state's sovereignty.") (citing *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 117 S.Ct. 2028, 138 L.Ed.2d 438 (1997)). Defendants argue that Colorado's interests in its police powers and the integrity of its criminal law system is paramount, and interests of sovereignty should bar *Ex parte Young*.

ANR Pipeline declined to extend the *Ex parte Young* doctrine to the realm of state taxes because the Tenth Circuit concluded that this implicated a core aspect of a state's sovereign immunity. In so holding, the Tenth Circuit noted:

> Congress has made it clear in no uncertain terms that a state has a special and fundamental interest in its tax collection system. . . . As the Supreme Court explained in *Rosewell*, the Tax Injunction Act "was first and foremost a vehicle to limit drastically federal district court jurisdiction to interfere with so important a local concern as the collection of taxes." *Rosewell*, 450 U.S. at 522, 101 S.Ct. 1221. The statute had its roots in Congress' recognition of "the imperative need of a State to administer its own fiscal operations." *Tully v. Griffin, Inc.*, 429 U.S. 68, 73, 97 S.Ct. 219, 50 L.Ed.2d 227 (1976). We do not doubt, therefore, that a state's interests in the integrity of its property tax system lie at the core of the state's sovereignty. Indeed, where it is possible to imagine a state government continuing to maintain its sovereignty despite the

> lack of any ownership of land, cf. *Coeur d'Alene Tribe*, 117 S.Ct. at 2041, it is impossible to imagine that a state government could continue to exist without the power to tax.

Id. at 1193. The Court concluded that the plaintiffs' request that Kansas "recertify" its tax assessment of the plaintiffs' personal property and rewrite its tax laws, was too intrusive into Kansas' sovereignty. Therefore, the Court declined to apply the *Ex parte Young* exception and held that the claim was barred by Eleventh Amendment immunity and the proper forum was state court. See *id.*

In this case, no state property interests are implicated. Indeed, the Tenth Circuit has interpreted the *Coeur d'Alene* limit, outlined in *ANR Pipeline*, as only applying to cases involving property interests.

The Tenth Circuit held "that if the relief requested involved the adjudication of property interests (like a quiet title action) that 'implicate[ ] special sovereignty interests' and is coupled with far-reaching and invasive relief, the *Ex parte Young* doctrine is inapplicable, and the state should be allowed to respond to the claims against it in its own courts." *Elephant Butte Irr. Dist. of New Mexico v. Dep't of Interior*, 160 F.3d 602 (10th Cir.1998); see, also *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (allowing suit to proceed in federal court to address prevention of unconstitutional state conduct, but the case did not substantially involve state property interests); *Powder River Basin Resource Council v. Babbitt*, 54 F.3d 1477 (10th Cir.1995) (allowing federal jurisdiction, but involved a request to enjoin a state's continuing violation of provisions of a federal environmental law and did not principally involve a state property interest); *Johns v.*

Stewart, 57 F.3d 1544 (10th Cir.1995) (Eleventh Amendment does not bar the portion of the plaintiffs' complaint seeking prospective relief preventing an ongoing violation of federal law, but no state property interest was implicated. Although the suit required the state to distribute monies under the Social Security Act, the state did not have a property interest in the benefit payments.); *Elephant Butte*, 160 F.3d at 609 ("state property interests impact whether the court chooses to exercise jurisdiction over state officials").

I conclude that the effect of Plaintiffs' claim on Colorado's interests in its police powers and the integrity of its criminal law system is not the kind anticipated by the Supreme Court in *Coeur d'Alene*, 521 U.S. 261, 117 S.Ct. 2028, 138 L.Ed.2d 438. Defendants cite no authority for the proposition that a state's police power or the integrity of its criminal law systems are special sovereign interests. The Tenth Circuit has described the "special sovereignty interests" language of *Coeur d'Alene* as applying to only the "extreme and unusual case." *Elephant Butte*, 160 F.3d at 612. This is not such a case. Colorado's state sovereign interests in the welfare of NGRI patients is not similar in kind to the property interests represented in *Coeur d'Alene* and *ANR Pipeline*. My decision to allow this suit to proceed in federal court will have minimal effect on the sovereignty and autonomy of Colorado. Finally, the balance of Colorado's interest and the federal rights and interests at stake in this matter weigh in favor of federal jurisdiction. See *Elephant Butte*, 160 F.3d at 613. The relief

requested by Plaintiffs in their second amended complaint, involves enjoining a continuing violation of federal law that would have only an incidental effect on state sovereign interests.

See *Coeur d'Alene*, 117 S.Ct. at 2040. I conclude that, federal jurisdiction over the individual Defendants in their official capacities, for prospective relief is not barred by the Eleventh Amendment and instead is allowed under the *Ex parte Young* exception. See *Elephant Butte*, 160 F.3d at 612. Therefore, this claim survives.

2. Qualified Immunity

Defendants next argue that the doctrine of qualified immunity bars Plaintiffs' claims against the individual Defendants sued in their individual capacity. Qualified immunity shields government officials from liability when performing discretionary functions that do not violate clearly established statutory or constitutional rights of which a reasonable person would have known. See *Tonkovich v. Kansas Bd. of Regents*, 159 F.3d 504, 516 (10th Cir.1998). "The key to the qualified immunity inquiry is the 'objective reasonableness of the official's conduct in light of the legal rules that were clearly established at the time the action was taken.' " *Id.* (internal citations omitted). A two part test determines whether qualified immunity is implicated:

> First, we determine whether the plaintiff has sufficiently alleged that the defendant violated a statutory or constitutional right. If the answer is yes, then we determine whether the right was clearly established such that a reasonable person

> in the defendant's position would have known that his or her conduct violated that right.

Id. (internal citations omitted).

As a threshold matter, Defendants argue that Plaintiffs' claim must be dismissed because respondeat superior liability is not a basis upon which to rest liability for a constitutional violation. See, e.g., *Monell v. Dep't of Social Services*, 436 U.S. 658, 694-695, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). Defendants also argue that Plaintiffs' claim does not implicate the personal participation of Defendants. However, I conclude that the well-pled allegations in the second amended complaint, taken as true and construed in Plaintiffs' favor, implicate the personal fault of the individual Defendants and do not rely on respondeat superior liability.

Defendants attempt to distinguish this case from *Sutton* in which the Tenth Circuit rejected a defense of qualified immunity. *Sutton*, 173 F.3d 1226. Defendants characterize this case as follows:

> the complaint contained allegations of personal participation of the individual defendant in that the individual defendant, in a position of authority, knew of the particular assaults and did nothing to prevent them, and the law was clearly established that knowledge of such assaults and failure to take action to prevent them constituted a constitutional violation.

(Reply in Support of Motion to Dismiss, p. 10) (emphasis in the original). Here, the allegations in *Sutton* parallel Plaintiffs' allegations in the second amended complaint.

In their second amended complaint, Plaintiffs make the following allegations against the individual Defendants. They allege that Mr. Hawkins "has been and continues to be personally aware of the conditions at CMHI-P and the lack of adequate medical and psychiatric care and treatment provided to the patients at CMHI-P." (Second Amended Complaint, § 33). They allege that Mr. Toerber is likewise "personally aware of the conditions at CMHI-P and the inadequate medical and psychiatric care and treatment provided to the patients held at CMHI-P." (Second Amended Complaint, § 35). Plaintiffs further allege that Defendants have operated the CMHI-P in a manner that consciously and systematically deprives Plaintiffs of appropriate care. (Second Amended Complaint, § 59). Plaintiffs allege that Mr. Toerber and Mr. Hawkins "had actual notice from planning documents developed and published by CMHI-P that the level of staffing in the forensic unit was not adequate . . . to provide the minimally adequate treatment guaranteed by the United States Constitution. Despite this knowledge, Defendants, including Defendants Toerber and Hawkins, failed to take reasonable actions to maintain sufficient levels of trained professional staff . . . " (Second Amended Complaint, § 63). They go on to allege that Defendants Toerber and Hawkins subjected Plaintiffs to a pattern of substandard care, failed to secure the financial and human resources constitutionally necessary, and failed to investigate, intervene or correct substandard care of which they had direct knowledge. (Second Amended Complaint, § 71). Finally, Plaintiffs specify that these failures by the individual Defendants continue to

violate the Due Process Clause of the Fourteenth Amendment. (Second Amended Complaint, § 86).

Because I take all Plaintiffs' allegations as true in the context of a motion to dismiss, I deny Defendants' motion. See *Sutton*, 173 F.3d at 1236. Plaintiffs allege that the individual Defendants personally participated in the Due Process violations. Defendants concede, as they must, that a committed person has a constitutional right to adequate food, shelter, clothing, and medical care. (Motion to Dismiss, p. 20); see also *Youngberg v. Romeo*, 457 U.S. 307, 324, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982) (committed individuals "enjoy[ ] constitutionally protected interests in conditions of reasonable care and safety, reasonably nonrestrictive confinement conditions, and such training as may be required by these interests."). Further, I conclude that Plaintiffs allege Due Process violations of a type known by a reasonable person in the health care administration field. See *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987) (a right is established if [sic] is "sufficiently clear that a reasonable official would understand that what he is doing violates that right."). As the case is now postured, I deny Defendants' motion to dismiss for qualified immunity.

C. Americans with Disabilities Act

In their third claim for relief, Plaintiffs allege violations of Title II of the Americans with Disabilities Act, 42 U.S.C. §§ 12131, et seq. ("ADA"). Title II of the ADA generally prohibits any form of discrimination against disabled persons by a public entity. See, e.g., *Thompson v.*

Colorado, 29 F.Supp.2d 1226 (D.Colo.1998). Plaintiffs assert this claim against both the individual and state Defendants. In their response to Defendants' motion to dismiss, Plaintiffs concede that the Tenth Circuit does not allow Title II ADA suits against individuals in their personal capacities. See *Butler v. City of Prairie Village, Kan.*, 172 F.3d 736, 744 (10th Cir.1999); *Montez v. Romer*, 32 F.Supp.2d 1235, 1240-41 (D.Colo.1999). Thus, I grant Defendants' motion to dismiss the individual Defendants in this capacity.

Defendants again argue that Plaintiffs cannot assert this ADA claim against the state or state officials because of Eleventh Amendment sovereign immunity. Plaintiffs initially respond that, by removing this case to federal court, Defendants waived their Eleventh Amendment defense. See *ANR Pipeline*, 150 F.3d at 1188 ("A state may waive its Eleventh Amendment immunity by consenting to be sued, but only in the clearest and most unmistakable terms."); See *Sutton*, 173 F.3d at 1234 (citing *Gallagher*, 502 F.2d at 830) ("[A]n unequivocal intent to waive immunity seems clear when a state, facing suit in its own courts, purposefully seeks a federal forum."). However, for the reasons stated earlier in this opinion, I cannot conclude that Eleventh Amendment immunity is waived by Defendants in "clear" and "unmistakable" terms. The Notice of Removal effectively reserved this defense.

Defendants next argue that Title II of the ADA unconstitutionally abrogates sovereign immunity. They contend that even an express statutory waiver of sovereign immunity, such as that contained in the ADA, 42 U.S.C. § 12202, is ineffective if Congress does not possess

constitutional authority to subject a nonconsenting state to suit under the Act.

The Supreme Court has established a two-part test to determine whether Congress properly abrogated a states' Eleventh Amendment immunity through its Fourteenth Amendment enforcement powers: (1) a court must determine whether Congress has unequivocally expressed its intent to abrogate immunity; and (2) a court must determine whether Congress acted pursuant to a valid exercise of power.

See *Martin v. Kansas*, 190 F.3d 1120 (10th Cir.1999) (citing *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996)). Although Defendants concede that the ADA "unequivocally" abrogates immunity, they contend that Title II's abrogation is unconstitutional.

See, e.g., *Alsbrook v. City of Maumelle*, 184 F.3d 999 (8th Cir.1999) (en banc) (finding Title II of the ADA an unconstitutional exercise of Congress' Fourteenth Amendment powers); but see *Martin*, 190 F.3d 1120 (finding Title I of the ADA a permissible exercise of Congress' powers). Therefore, Defendants maintain that this suit is barred by sovereign immunity. I hold the issue of the constitutionality of Title II of the ADA in abeyance pending the Supreme Court's ruling in *Kimel v. Florida Bd. of Regents*, 139 F.3d 1426 (11th Cir.1998), cert. granted by *Kimel v. Florida Bd. of Regents*, 525 U.S. 1121, 119 S.Ct. 901, 142 L.Ed.2d 901 (1999) and *United States v. Florida Bd. of Regents*, 525 U.S. 1121, 119 S.Ct. 902, ___ L.Ed.2d ___ (1999). Oral arguments were heard by the Court on October 13, 1999.

28 U.S.C. § 2403(a) states, in relevant part:

> In any action, suit or proceeding in a court of the United States to which the United States or any agency, officer or employee thereof is not a party, wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court shall certify such fact to the Attorney General, and shall permit the United States to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The United States shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.

Under the District of Colorado's local rules, "a party who questions the constitutionality of an act of Congress in an action where neither the United States nor any of its agencies, officers, or employees is a party, shall give written notice, in duplicate, to the court . . . " D.C.Colo.LR 24.1 (emphasis added); see also *In re Bloch*, 207 B.R. 944, 952 (D.Colo.1997) (applying Local Rule 24.1 and stating "[f]ailure to notify the Attorney General is not a jurisdictional defect, and belated notice satisfies any requirement . . . Certification has occurred even after judgment at the appellate level.") (internal citations omitted). Defendants have not yet filed formal notice with this Court regarding its claim that the ADA is an unconstitutional enactment. Only upon receipt of this notice must I comply with the certification procedures in 28 U.S.C. § 2403. Therefore, if Defendants intend to persist in their assertions of Title II's constitutional infirmity, they must

comply with D.C.Colo.LR 24.1 within 10 days from the date of this Order.

D. Negligence

In this fourth and final claim for relief, Plaintiffs allege that the actions and omissions of Defendants and their employees constitute a substantial breach of duties owed to Plaintiffs. Defendants submit several grounds for dismissal of this claim. First, Defendants argue that Plaintiffs' allegations are not within an area for which governmental immunity has been waived under Colorado law. Second, Plaintiffs have failed to comply with the notice requirements under Colorado law. Finally, Defendants argue that I should not exercise jurisdiction over this claim.

1. Governmental Immunity

The Colorado Governmental Immunity Act, C.R.S. § 24-10-101, et seq. (the "CGIA"), covers "all the circumstances under which the state, any of its political subdivisions, or the public employees of such public entities may be liable in actions which lie in tort". C.R.S. § 24-10-102. "Public entity" is defined as "the state, county, city and county, municipality, school district . . . and every other kind of district, agency, instrumentality, or political subdivision thereof organized pursuant to law". C.R.S. § 24-10-103(5). "Public employee" is defined as "an officer, employee, servant, or authorized volunteer of the public entity". C.R.S. § 24-10-103(4). Neither Plaintiffs nor Defendants dispute that the DHS and the CMHI-P qualify

as public entities under the CGIA or that Mr. Toerber and Mr. Hawkins are public employees of these entities.

Although the CGIA generally grants immunity to public entities and their employees, it also contains statutory waivers of immunity.

> (1) A public entity shall be immune from liability in all claims for injury which lie in tort . . . Sovereign immunity is waived by a public entity in an action for injuries resulting from:
>
> . . .
>
> (b) The operation of any public hospital, correctional facility, as defined in section 17-1-102, C.R.S., or jail by such public entity.

C.R.S. § 24-10-106. "Operation" is defined in the CGIA as "the act or omission of a public entity or public employee in the exercise and performance of the powers, duties, and functions vested in them by law with respect to the purposes of any public hospital . . . " C.R.S. § 24-10-103(3)(b). Sovereign immunity is waived only if Defendants' activities relate to the hospital's purpose. See *Pack*, 894 P.2d at 37.

Plaintiffs argue that, while their negligence claim obviously lies in tort, their claim falls squarely within the statutory exception for the operation of a public hospital. Defendants acknowledge that "as a matter of statute and logic, provision of care and treatment to the Plaintiffs falls within the parameters of operation as a public hospital." The Colorado Supreme Court recently held that "the CGIA's waiver provisions are entitled to deferential construction in favor of victims injured by the negligence of

governmental agents, while the immunity provisions are subject to strict construction." *Walton v. State*, 968 P.2d 636, 643 (Colo.1998); see also *Pack v. Arkansas Valley Correctional Facility*, 894 P.2d 34 (Colo.App.1995).

The CMHI-P's specific statutory purpose is to provide for the "treatment and cure of such persons as may become mentally ill from any cause." C.R.S. § 24-13-101(1). Plaintiffs base their negligence claim on Defendants' alleged failure to comply with this statutory duty. This clearly relates to the CMHI-P's purpose of treating the mentally ill. Furthermore, the CMHI-P is a "public hospital" under the exception. Therefore, I conclude that CGIA immunity is waived for the public entity Defendants, the DHS and the CMHI-P.

Defendants next argue that Plaintiffs' claim sounds in medical malpractice and vicarious liability because Plaintiffs seek to hold the individual Defendants liable in tort for allegations that Plaintiffs have not been provided adequate medical care. Defendants argue that there is no such claim as medical negligence by respondeat superior. However, Plaintiffs' second amended complaint is sufficient in alleging individual negligence based on knowledge and failure to act.

Defendants finally assert that Plaintiffs fail to allege that the individual Defendants' actions were willful or wanton, thereby requiring me to dismiss this claim. C.R.S. § 24-10-110(5)(b). However, C.R.S. § 24-10-118(2)(a) does not require willful and wanton conduct for claims involving operation of public hospitals. For purposes of this motion to dismiss, in which I take all Plaintiffs' allegations as true, Plaintiffs have satisfied their pleading

requirements as to the individual Defendants. Therefore, I deny Defendants' motion to dismiss.

2. Notice Requirements of the CGIA

Defendants contend that Plaintiffs' notices of claims, required under the CGIA, fail to invoke the criminal statutes applicable to Plaintiffs' NGRI status. C.R.S. § 16-8-101, et seq. Defendants, therefore, contend that Plaintiffs' claim fails the notice requirements of C.R.S. § 24-10-109 and should be dismissed.

I conclude that Plaintiffs sufficiently complied with the notice requirements of the CGIA. The CGIA notice provisions do not require Plaintiffs to identify the specific legal duty which forms the basis of their negligence claims. Instead, the CGIA requires that notices contain the following information: (1) the name and address of the claimant and the name and address of his attorney; (2) a concise statement of the factual basis of the claim, including the date, time, place, and circumstances of the act, omission, or event complained of; (3) the name and address of any public employee involved; (4) a concise statement of the nature and the extent of the injury claimed to have been suffered; and (5) a statement of the monetary damages being requested. Plaintiffs' notices comply with these provisions. (Exh. A to Motion to Dismiss). Defendants impermissibly read an additional requirement into the notice provisions. They argue that, to the extent Plaintiffs rely on any duties that might be presented in the NGRI statute, C.R.S. § 16-8-101 et seq., Plaintiffs fail to reference this statute in their notice. This argument fails for a number of reasons.

First, as Plaintiffs note, the NGRI statute supplies no duties for the care and treatment of NGRI patients. This is why they contend the Treatment Act supplies these duties. Therefore, Plaintiffs do not base their negligence claims on duties in the NGRI statute. Second, in their notices, Plaintiffs disclose that they were "found to be not guilty by reason of insanity." (Exh. A, Motion to Dismiss). This suffices to put Defendants on notice of the possible relevance of the NGRI statute. The Colorado Supreme Court has held that a plaintiff need only substantially comply with the CGIA's notice provisions. See *Woodsmall v. Regional Transport. Dist.*, 800 P.2d 63, 69 (Colo.1990). Therefore, to the extent that notice of NGRI status may be required, Plaintiffs have substantially complied with the notice provisions. Defendants have shown no prejudice to their ability to defend by reason of any alleged omission in the notice. See *id.*

Finally, as noted above, the CGIA notice requirements do not require Plaintiff to identify the specific legal duty which forms the basis of their claims. The issue of whether a defendant owes a duty to the plaintiff is legal, not factual. See *Davenport v. Community Corrections of Pikes Peak Region, Inc.*, 962 P.2d 963, 966 (Colo.1998) ("To recover on a claim of negligence, the plaintiff must establish the existence of a legal duty on the part of the defendant, breach of that duty by the defendant, causation, and damages . . . The initial determination of whether a defendant owes a duty to the plaintiff is a question of law to be considered by the court.") (emphasis added). The CGIA does not require the notice of legal grounds or claims for relief. Defendants' motion to dismiss on this basis is denied.

3. Jurisdiction over Negligence Claim

Defendants again argue that because Plaintiffs remain in the continuing jurisdiction of the state court under the NGRI statute, *Gilliland*, 769 P.2d at 479, I should not exercise subject matter jurisdiction of Plaintiffs' fourth claim for relief. I decline to accept this basis for dismissal for the same reasons that I declined to accept it for other claims. Defendants removed this case from state court to federal court. Further, the decision to abstain is discretionary and only undertaken with the greatest caution. See *Colorado River Water*, 424 U.S. at 813-814, 96 S.Ct. 1236 ("The doctrine of abstention . . . is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it."). I decline to so abstain.

E. 42 U.S.C. § 1985

Defendants note that 42 U.S.C. § 1985 is mentioned in Plaintiffs' second amended complaint, but no claim is included under this provision. To the extent that Plaintiffs assert any such claim, it is hereby dismissed. Plaintiffs do not contest Defendants' argument on this issue.

IV.

In conclusion, I determine that the following claims survive this Order:

(1) Violation of Colorado's Care and Treatment of the Mentally Ill Act (as against all Defendants, but there is no longer any entitlement to damages);

(2) Violation of Due Process pursuant to 42 U.S.C. § 1983 (as against Mr. Hawkins and Mr. Toerber in their official capacities for prospective injunctive relief only, and in their individual capacities as pled);

(3) Violation of Title II of the ADA (as to the State Defendants and individual Defendants in their official capacities only); and

(4) Negligence (as to all Defendants).

Accordingly, I ORDER that:

(1) Defendants' motion to dismiss Plaintiffs' first claim for relief under the Treatment Act is GRANTED only to the extent that damages are requested;

(2) Defendants' motion to dismiss Plaintiffs' second claim for relief for violation of Due Process pursuant to 42 U.S.C. § 1983 is GRANTED as to Defendants DHS and CMHI-P. This claim survives against Mr. Toerber and Mr. Hawkins in their official capacities for prospective injunctive relief only, and survives against Mr. Toerber and Mr. Hawkins in their individual capacities as pled;

(3) Defendants' motion to dismiss Plaintiffs' third claim for relief for violation of the ADA is HELD IN ABEYANCE;

(4) To preserve arguments of the constitutional infirmity of Title II of the ADA, Defendants must comply with D.C.Colo.LR 24.1 within 10 days from the date of this Order;

(5) Defendants' motion to dismiss Plaintiffs' fourth claim for relief for Negligence is DENIED; and

(6) To the extent that Plaintiffs assert a claim under 42 U.S.C. § 1985, Defendants' motion to dismiss is GRANTED.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JAMES NEIBERGER; DANFORD ELDRIDGE; PAUL GARDNER; TERENCE JACOBS,	)	
Plaintiffs-Appellees,	)	No. 99-1535
v.	)	
ROBERT HAWKINS, Superintendent of the Colorado Mental Health Institute at Pueblo; GARRY TOERBER, Associate Manager for the Office of Direct Services of the Department of Human Services; ROBERT L. HAWKINS, individually; GARRY TOERBER, individually,	)	
Defendants-Appellants,	)	
and	)	
COLORADO DEPARTMENT OF HUMAN SERVICES; COLORADO MENTAL HEALTH INSTITUTE AT PUEBLO,	)	
Defendants.	)	

ORDER

Filed April 27, 2001

Before **BIRSCOE, HOLLOWAY,** and **POLITZ,*** Circuit Judges.

Appellants' petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: /s/ Greg Heerdt
Deputy Clerk

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*The Honorable Henry A. Politz, United States Court of Appeals for the Fifth Circuit, sitting by designation.